

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

IN RE:

LARRY BRUCE THACKER,

CASE NO.: 12-50370-KKS

CHAPTER: 7

Debtor.

ORDER APPROVING CREDITOR'S APPLICATION FOR AWARD OF
ADMINISTRATIVE EXPENSE CLAIM PURSUANT TO SETTLEMENT
AGREEMENT [DOC. 463] (DOC. 848)

THIS CASE is before the Court on the *Application for Award of Administrative Expense Claim Pursuant to Settlement Agreement [Doc. 463]* ("Application," Doc. 848) filed by unsecured creditor, SE Property Holdings, LLC ("SEPH"). By the Application, SEPH seeks approval of \$50,000.00 in attorneys' fees it incurred in successfully defending an appeal of a fraudulent transfer judgment that benefitted the bankruptcy estate.¹

The duly scheduled hearing on the Application took place on January 23, 2020. Counsel for SEPH, the Chapter 7 Trustee, and counsel for

¹ During this case, but after the appeal concluded, the Trustee and SEPH settled a variety of issues. As part of that settlement the Trustee agreed not to object to an administrative claim in favor of SEPH for attorney's fees, up to \$50,000, incurred in defending the Appeal. Doc. 455, pp. 2-3. The Trustee did not seek or obtain prior bankruptcy court approval to retain SEPH's counsel to defend the appeal.

Trustmark National Bank (“Trustmark”) and Centennial Bank (“Centennial”) appeared. At the hearing, the Trustee expressed approval for the Application and acknowledged that the estate would not have anything to distribute had SEPH not defended the appeal. No party filed a written objection to the Application, but at the hearing creditors Trustmark and Centennial (collectively, “Banks”) voiced objections. At the conclusion of the hearing the Court requested additional briefing. SEPH filed its brief in support February 21, 2020;² the Banks filed a joint reply March 6, 2020.³ The Court then took the matter under advisement.

BACKGROUND

The following facts are set forth in a prior Order of this Court.⁴

In 2009, SEPH’s predecessor in interest sued Debtor, Larry Bruce Thacker, in state court to enforce a debt obligation. In March of 2010 the state court entered a money judgment against Debtor in excess of \$1.9 million. Discovery in aid of execution revealed that Debtor had transferred substantially all his assets to a newly created revocable trust of which

² Doc. 877.

³ Doc. 878.

⁴ *Venn, et al. v. Thacker*, A.P. Case No. 13-05019-KKS, *Order Granting Motion of Plaintiff, SE Property Holdings, LLC, for Final Summary Judgment (Doc. 63) and Denying Defendant’s Motion for Summary Judgment (Doc. 113)*, Doc. 185, pp. 3-7.

Debtor was both trustee and beneficiary. SEPH sought and obtained a judgment voiding those transfers as fraudulent (the “Fraud Judgment”). In July of 2012 Debtor appealed the Fraud Judgment and filed the instant Chapter 7.⁵

Had Debtor’s appeal been successful, the property transferred to the trust would not have remained property of the bankruptcy estate. The pendency of the appeal prevented the Trustee from liquidating the transferred property for a significant period, leaving the Trustee with no cash with which to defend the appeal.⁶ SEPH’s attorneys litigated and successfully defended the appeal. As a result, the Trustee collected the majority of the \$2,350,205 he has for distribution to creditors.⁷

THE APPLICATION

The Application reflects attorneys’ fees totaling \$83,580, reduced to \$75,222 due to a 10% discount, based on time records of four associates, four partners, and one “of counsel.”⁸ The Banks oppose the Application on the grounds that (1) the claim for attorney’s fees does not fit within the enumerated bases for an award of administrative expenses under 11 U.S.C.

⁵ Debtor obtained relief from the automatic stay in order to prosecute the appeal. Doc. 254.

⁶ Chapter 7 Trustee’s *Interim Report*, July 26, 2013, Doc. 292.

⁷ Chapter 7 Trustee’s *Interim Report*, October 16, 2019, Doc. 836.

⁸ Doc. 848, pp. 41-61.

§ 503(b); and (2) the time sheets attached to the Application reflect improper block billing and duplicative efforts.

DISCUSSION

SEPH's Application may be approved under 11 U.S.C. § 503(b).

As the applicant, SEPH has the burden to demonstrate entitlement to its claim for administrative expenses under 11 U.S.C. § 503(b).⁹ SEPH does not dispute the Banks' assertion that the Application does not fall squarely within the nine bases enumerated in § 503(b)(1)-(9). Instead, SEPH argues that the Court has discretion to approve the Application because the term "including" in § 503(b) precedes subsections (b)(1)-(9).

SEPH's argument is supported by the Code and applicable caselaw. Section 503(b) provides: "[a]fter notice and a hearing, there shall be allowed administrative expenses . . . *including*—" those set forth in 503(b)(1)-(9).¹⁰ Section 102(3) of the Bankruptcy Code specifically provides that "includes" and 'including' are not limiting."¹¹ The District Court for the Northern District of Florida has recognized that administrative expenses are to be dealt with on a case by case basis, and that the use of "including" in § 503(b)

⁹ *In re Fontainebleau Las Vegas Holdings, LLC*, 574 B.R. 895, 902 (Bankr. S.D. Fla. 2017) (*citing In re Concrete Prod., Inc.*, 208 B.R. 1000, 1006 (Bankr. S.D. Ga. 1996)).

¹⁰ 11 U.S.C. § 503(b) (2020) (emphasis added).

¹¹ 11 U.S.C. § 102(3) (2020).

has allowed courts to grant administrative expense status to expenditures, such as attorneys' fees, not enumerated in subsections (1)-(9).¹²

An illustrative case is that of *In re Colortex Industries, Inc.*¹³ In *Colortex* the Eleventh Circuit had before it a district court ruling that allowed interest on a Chapter 11 trade creditor's administrative claim as an administrative expense under 11 U.S.C. § 503(b).¹⁴ In affirming that ruling, the Eleventh Circuit stated:

It is noteworthy that the right of an administrative claimant to interest is not specifically provided for in 11 U.S.C. § 503(b)(1). Rather, if a right to such postpetition interest is to be found, it must be derived from a broad interpretation of that section's use of the term "including."¹⁵

Noting that "the word 'including' is not intended to be limiting," the Eleventh Circuit found that the wording of the Code does not preclude

¹² *Park Nat. Bank v. Univ. Ctr. Hotel, Inc.*, No. 1:06-CV-00077-MP-AK, 2007 WL 604936, at *5 (N.D. Fla. 2007). See also *In re Mark Anthony Const., Inc.*, 886 F.2d 1101, 1106 (9th Cir. 1989); *In re Maust Transp., Inc.*, 589 B.R. 887, 893 (Bankr. W.D. Wash. 2018) (citing *In re Al Copeland Enters.*, 991 F.2d 233, 239 (5th Cir. 1993)); 4 Collier on Bankruptcy P 503.05 (16th 2020) ("Section 503(b) states that the administrative expenses 'include' the nine listed categories. Section 102(3) provides that the terms 'include' and 'including' are not to be construed as limitations. The result is that the nine described categories cannot be considered an exhaustive list of all of the types of claims that are entitled to administrative priority treatment. The court may determine that additional types of claims are expenses that should be accorded administrative priority in a particular case.").

¹³ *In re Colortex Indus., Inc.*, 19 F.3d 1371 (11th Cir. 1994).

¹⁴ *Id.* at 1373.

¹⁵ *Id.* at 1377.

allowing other claims reasonably demonstrated to be actual, necessary costs of administration.¹⁶

In *In re Connolly North America, LLC*, the Sixth Circuit affirmed allowance of an administrative claim for attorney's fees incurred by a Chapter 7 creditor that removed the acting trustee for misconduct and recovered a malpractice judgment against the removed trustee.¹⁷ That court and others that allow Chapter 7 creditors' administrative claims for substantial contribution do so if (1) the creditor's contribution to the estate is substantial and tangible, rather than incidental, and (2) the contribution was rendered under circumstances that mitigated the risk of duplication or interference with the Chapter 7 trustee.¹⁸

Other courts have held that because § 503(b)(3)(D) authorizes administrative expenses for creditors making substantial contributions in Chapter 9 or 11 cases, substantial contribution claims by Chapter 7

¹⁶ *Id.*

¹⁷ *In re Connolly N. Am., LLC*, 802 F.3d 810 (6th Cir. 2015).

¹⁸ *Id.* at 816-17; *Matter of Zedda*, 169 B.R. 605 (Bankr. E.D. La. 1994) (allowed administrative expense claim for substantial contribution for Chapter 7 creditor that assisted trustee in developing facts and issues and recovering on a pre-petition fraudulent transfer action); *In re Pappas*, 277 B.R. 171 (Bankr. E.D.N.Y. 2002) (administrative expense approved for Chapter 7 creditor that facilitated trustee's recovery of transferred properties); *In re Maqsoudi*, 566 B.R. 40 (Bankr. C.D. Cal. 2017) (administrative expense claim allowed for Chapter 7 creditor's assistance to trustee in successful adversary proceeding); *In re Javed*, 592 B.R. 615, 623 (Bankr. D. Md. 2018) (allowed administrative expense claim to Chapter 7 creditor for assisting trustee collecting funds for estate).

creditors are prohibited.¹⁹ This approach is inconsistent with the plain language of § 503(b)(3)(D) within the framework articulated by § 503(b). As the Sixth Circuit aptly stated, “[n]owhere does the [Code] say . . . ‘expenses incurred in making a substantial contribution in a case under Chapters 9 or 11, but not Chapter 7, may be allowed’; or, ‘only the enumerated expenses shall be allowed.’”²⁰

In a case with facts similar to those at bar, the court in *In re Maust Transport, Inc.* approved an administrative claim for substantial contribution by a Chapter 7 creditor.²¹ In *Maust*, a Chapter 7 creditor learned of a possible fraudulent transfer based on pre-petition research into the debtor.²² The trustee was hesitant to pursue the claim because of uncertainty of success and inability to locate a firm willing take the matter on contingency.²³ Creditor’s counsel provided the trustee relevant information, located a law firm with the necessary expertise, and convinced that firm to represent the estate on contingency.²⁴ With that firm’s

¹⁹ *Connolly*, 802 F.3d at 822-23 (O’Malley, J., dissenting) (citations omitted) (comprehensive review of caselaw).

²⁰ *Id.* at 816. *But see In re Conty*, 205 B.R. 329, 332 (Bankr. M.D. Fla. 1996) (interpreting § 503(b) to allow substantial contribution claims for Chapter 7 creditors would render § 503(b)(3)(D) meaningless).

²¹ *In re Maust Transp., Inc.*, 589 B.R. 887 (Bankr. W.D. Wash. 2018).

²² *Id.* at 891.

²³ *Id.*

²⁴ *Id.* at 891, 899.

representation the trustee settled the suit and collected the majority of the estate's \$180,218 total assets.²⁵ The bankruptcy court held that the creditor's attorney's fees were compensable as administrative expenses under § 503(b) because they resulted in a substantial benefit to the estate and were not duplicative of the trustee's efforts.²⁶

Applying this standard here, SEPH's administrative expense claim should be approved. Like in *Maust*, it is undisputed that SEPH's successful defense of the appeal enabled the Trustee to collect most of the assets available for distribution to creditors without duplicating the Trustee's efforts.²⁷ SEPH and its attorneys were best situated to defend the appeal because their prepetition investigation of and litigation with Debtor generated the underlying fraudulent transfer claims.²⁸ As the court in *Maust* stated:

The purpose of § 503(b)(3)(D) is to encourage creditors in whatever chapter a bankruptcy case is filed to "substantially contribute" to the estate by pursuing funds that will be available for distribution to claimants. If the particular facts of a case warrant reimbursement, the court should have the ability to

²⁵ *Id.* at 891-92.

²⁶ *Id.* at 898-99, 900.

²⁷ *Compare In re Fontainebleau Las Vegas Holdings, LLC*, 574 B.R. 895, 904 (Bankr. S.D. Fla. 2017) (denied administrative expense claim to Chapter 7 creditor where the services provided were not "necessary to fill a void" left by the trustee).

²⁸ *Accord In re Javed*, 592 B.R. 615, 623 (Bankr. D. Md. 2018).

fashion a remedy that will foster rather than hinder such actions for the benefit of the estate.²⁹

The fees sought by SEPH are reasonable.

A party seeking approval of attorneys' fees as an administrative expense pursuant to § 503(b) has the burden to demonstrate that the fees sought are reasonable in light of the tasks performed by providing detailed time records.³⁰ As with professional fees pursuant to § 330, fees determined to be excessive, duplicative or unnecessary should be reduced or disallowed.³¹

The Banks object to the fees requested in the Application on the grounds that the underlying time records reflect improper block billing and an excessive number of contributing attorneys. As to block billing, the Banks' characterization is accurate. Several entries in SEPH's attorneys' billing records describe three or more tasks within a single time block. Granted, this Court has held that the "aggregation of multiple tasks into one billing entry, referred to as block billing or lumping, is routinely disallowed or reduced."³² But the Court is reluctant to parse SEPH's

²⁹ *Maust*, 589 B.R. at 898–99.

³⁰ *In re Key Auto Liquidation Ctr., Inc.*, 384 B.R. 599, 605 (Bankr. N.D. Fla. 2008).

³¹ *See, e.g.*, 11 U.S.C. § 330(a)(4)(A); *In re Deval Corp.*, 592 B.R. 587, 602 (Bankr. E.D. Pa. 2018), *aff'd sub nom. In re DeVal Corp.*, 601 B.R. 725 (E.D. Pa. 2019).

³² *In re Britt*, 551 B.R. 522, 524 (Bankr. N.D. Fla. 2016).

attorneys' billing records under these facts. The attorneys handling the appeal were unaware that their fees would be subject to this Court's scrutiny. Further, the attorneys provided their legal services during 2012-13 and this Court's descriptive ruling on block billing was not published until 2016.

As to the number of attorneys involved with the appeal, the Court agrees that SEPH's employment of nine different attorneys appears excessive. If the Court were to deduct the billing for all attorneys other than one partner, two associates, and one paralegal, the total fees would be reduced by approximately \$11,000.00. That would result in a reduction of SEPH's total fees from \$75,222 to approximately \$64,000.00 (after the 10% discount). SEPH has already offered to reduce its \$75,222 in fees to \$50,000.³³ That sum is less than the amount that would result from disallowing fees for several attorneys. For that reason, no reduction based on the number of attorneys is necessary or appropriate.

CONCLUSION

Under § 503(b), this Court has discretion to award administrative expenses to Chapter 7 creditors under certain circumstances. That

³³ Doc. 848, p. 1.

discretion is not limited by § 503(b)(3)(D). SEPH's attorneys conferred a substantial benefit on the Chapter 7 estate and did not interfere with or duplicate efforts by the Chapter 7 Trustee; their requested fees are reasonable. The Application before this Court represents one of those rare cases in which allowance of an administrative claim to a Chapter 7 creditor for substantial contribution is appropriate.

For the reasons stated, it is

ORDERED: SEPH's *Application for Award of Administrative Expense Claim Pursuant to Settlement Agreement [Doc. 463]* (Doc. 848) is APPROVED.

DONE and ORDERED on May 28, 2020.



KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

Attorney for SE Property Holdings, LLC is directed to serve a copy of this Order on interested parties and to file a Proof of Service within three (3) days of this Order.